

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

IN RE NYC BUS TOUR ANTITRUST LITIGATION	)	Master Case File No. 13-CV-0711
	)	<b>DECLARATION OF SHANNON R. WHEATMAN, PH.D. IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT RE: ADEQUACY OF NOTICE PROGRAM</b>
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This Document Relates to:	)	
ALL CASES	)	

I, Shannon R. Wheatman, being duly sworn, hereby declare as follows:

1. I am a Senior Vice President of Kinsella Media, LLC (“KM”), an advertising and notification firm in Washington, D.C. specializing in the design and implementation of class action and bankruptcy notification programs. My business address is 2120 L Street, NW, Suite 860, Washington, D.C. 20037. My telephone number is (202) 686-4111.

2. KM was retained to design and implement the Notice Program in this litigation. I submit this declaration to describe the elements of the Notice Program and provide my expert opinion that the Notice Program satisfies the requirements of due process and Rule 23.

3. This declaration will describe my experiences in designing and implementing notices and notice plans, my credentials to opine on the overall adequacy of the notice effort, as well as describe the notices (the “Notice” or “Notices”) proposed here for *In re NYC Bus Tour Antitrust Litigation*, including how they were developed and why I believe they will be effective.

**RELEVANT EXPERIENCE**

4. I have served as a qualified class action notice expert in many major class actions. State and federal courts have accepted my analyses and expert testimony on whether information is effectively communicated to people. My curriculum vitae is

attached as **Exhibit 1**.

5. I have testified in court as an expert in *Spillman v. RPM Pizza, Inc.*, No. 10-349 (M.D. La.); *PRC Holdings LLC v. East Resources, Inc.*, No. 06-C-81 (Cir. Ct. W. Va.); *Guidry v. American Public Life Ins. Co.*, No. 2008-3465 (14th Jud. Dist. Ct., Calcasieu Parish); *Webb v. Liberty Mutual Ins. Co.*, No. CV-2007-418-3 (Cir. Ct. Ark); and *Beasley v. The Reliable Life Insurance Co.*, No. CV-2005-58-1 (Cir. Ct. Ark). I have been deposed as an expert in *Thomas v. A. Wilbert Sons, LLC*, No. 55,127 (18th Jud. Dist. Ct., Iberville Parish).

6. I have been involved in some of the largest and most complex national notification programs in the country, including: *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827 (N.D. Cal.) (involving tens of millions of consumers); *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (E.D. La.); *Kramer v. B2Mobile, LLC* (text messaging case involving 40 million consumers), No. 10-cv-02722 (N.D. Cal.); *In Re: Enfamil LIPIL Mkt'g & Sales Pract. Litig.* (consumer fraud settlement involving millions of infant formula purchasers), No. 11-MD-02222 (S.D. Fla.); *Fogel v. Farmers Group, Inc.* (\$455 million settlement involving tens of millions of insureds), No. BC300142 (Cal. Super. Ct., LA County); *In re Katrina Canal Breaches Consolidated Litig.* (settlement obtained for Hurricane Katrina and Rita survivors), No. 05-4182 (E.D. La.); *Lockwood v. Certegy Check Services, Inc.* (data theft settlement involving over 37 million consumers), No. 8:07CV-1434 (M.D. Fla.); *Grays Harbor Adventist Christian School v. Carrier Corp.* (defective product settlement involving high efficiency furnaces), No. 05-05437 (W.D. Wash.); and many others.

7. Courts have admitted my expert testimony on quantitative and qualitative evaluations of the effectiveness of notice programs, and several courts have commented favorably on the record regarding the effectiveness of class action notice plans I have done. Selected judicial comments are included in the attached curriculum vitae.

8. My qualifications include expertise in the form and content of class action notice. For example, while serving with the Federal Judicial Center (“FJC”), I played an integral part in the development of the illustrative, “model” forms of class action notice, designed to satisfy the plain language requirements of Federal Rule of Civil Procedure 23(c)(2). This research formed the basis for my doctoral dissertation, *The Effects of Plain Language Drafting on Layperson’s Comprehension of Class Action Notices* (2001) (Ph.D. dissertation, University of Georgia). To assist judges and attorneys, in state as well as federal courts, the FJC has posted the notices at [www.fjc.gov](http://www.fjc.gov).

9. I have authored and co-authored several published articles on notice and due process. *See, e.g.*, Shannon R. Wheatman & Katherine M. Kinsella, *International Class Action Notice*, in *WORLD CLASS ACTION: A GUIDE TO GROUP AND REPRESENTATIVE CLASS ACTIONS AROUND THE GLOBE* 673-686 (Paul Karlsgodt ed., 2012); Katherine Kinsella & Shannon Wheatman, *Class Notice and Claims Administration*, in *PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE UNITED STATES: A HANDBOOK* 338-348 (Albert A. Foer & Randy M. Stutz eds., 2012); Shannon R. Wheatman & Terri R. LeClercq, *Majority of Class Action Publication Notices Fail to Satisfy Rule 23 Requirements*, 30 REV. LITIG. 53 (2011); Katherine Kinsella & Shannon R. Wheatman, *Class Notice and Claims Administration*, in *THE INTERNATIONAL PRIVATE ENFORCEMENT OF COMPETITION LAW* 264–274 (Albert A. Foer & Jonathan W. Cuneo eds., 2010); Todd B. Hilsee, Shannon R. Wheatman & Gina M. Intrepido, *Do you really want me to know my rights? The ethics behind due process in class action notice is more than just plain language: A desire to actually inform*, GEO J. LEGAL ETHICS, 18 (4), 1359-1382 (2005); Todd B. Hilsee, Gina M. Intrepido & Shannon R. Wheatman, *Hurricanes, Mobility and Due Process: The “Desire-to-Inform” Requirement for Effective Class Action Notice Is Highlighted by Katrina*, 80 TULANE LAW REV. 1771 (2006).

## **NOTICE PROGRAM OVERVIEW**

10. The proposed Notice Program was designed to reach the greatest practicable number of Class Members, ensuring that they will be exposed to the Notice and be able to see, review, and understand it.

11. I have been involved in drafting the various forms of Notice described below. In my opinion, all forms of Notice are noticeable, clear, concise, and in plain, easily understood language.

12. In developing the Notice Program, it was first determined that a partial list of approximately 300,000 Class Members is available and that it would be reasonable to implement an individual notification effort to reach them (the "Direct Notice").

13. Since a comprehensive mailing list is not available, it is reasonable and appropriate to also reach Class Members through the use of paid media, earned media, and an informational website.

14. As detailed below, in my opinion, the Notice Program represents the best notice practicable and satisfies the requirements of due process and Rule 23.

## **NOTICE PROGRAM SUMMARY**

15. Although each case is unique, the methods and tools used in developing the Notice Program for this Settlement have been employed in many other court-approved notice plans.

16. The Class in this case is defined as:

All persons who, or entities that, purchased Defendants' "hop-on, hop-off" bus tours in New York City from February 1, 2009, until the date of the Preliminary Approval Order (the "Class Period"). Excluded from the Class are defendants, their present and former parents, subsidiaries, affiliates, and employees.

17. KM designed the Notice Program for this matter with information from GfK MediaMark Research, Inc. (“GfK MRI”), a nationally accredited media and marketing research firm that provides syndicated data on audience size, composition, and other relevant factors pertaining to major media including broadcast, magazines, newspapers, and outdoor advertising. GfK MRI provides a single-source measurement of major media, products, services, and in-depth consumer demographic and lifestyle/psychographic characteristics. Using GfK MRI’s 2013 Doublebase Study<sup>1</sup>, KM analyzed the demographics and media consumption habits for individuals who traveled to NY/NJ/PA and indicated that they participated in sightseeing when traveling (“NY/NJ/PA sightseeing travelers”). The data demonstrated that these individuals are likely to be adults 25 years of age or older with a household income of \$60,000 or greater. Internet media delivery estimates are not available for NY/NJ/PA sightseeing travelers, therefore, KM chose adults 25 years of age or older with a household income of \$60,000 or greater as the target audience for the purpose of providing media delivery estimates for the proposed paid media program.

18. Media vehicles were then analyzed and selected for their strength and efficiency in reaching NY/NJ/PA sightseeing travelers.

19. Based on information provided by defendants, it was determined that some Class Member purchases occurred internationally. Therefore some international paid media is necessary to reach those Class Members.

20. To effectively reach this Class, KM recommends a broad-based notice program that utilizes consumer magazines, newspaper supplements, Internet ad networks, global earned media with an internationally distributed press release, and a dedicated

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<sup>1</sup> GfK MRI produces an annual Doublebase, a study of more than 50,000 adults consisting of two full years of data. The MediaMark sample consists of over 26,000 respondents. Fieldwork is done in two waves per year, each lasting six months and consisting of 13,000 interviews. At the end of the interview, the fieldworker presents a self-administered questionnaire that measures approximately 500 product/service categories, 6,000 brands, and various lifestyle activities. Resulting data is weighted to reflect the probabilities of selection inherent in the sample design and then balanced so that major study demographics match the most recent independent estimates.

website in order to meet due process standards and provide the best notice practicable under the circumstances.

**Individual Notice**

21. A partial list of Class Members can be compiled based on information provided by defendants. An Email or Postcard Notice will be sent to approximately 300,000 persons or entities who have been identified as ticket purchasers.

22. Prior to mailing, all addresses will be checked against the National Change of Address (“NCOA”)<sup>2</sup> database, which is maintained by the United States Postal Service (“USPS”). In order to ensure the most accurate mailings possible, the addresses will also be certified via the Coding Accuracy Support System (“CASS”) and verified through Delivery Point Validation (“DPV”)<sup>3</sup>.

23. Postcards that are returned as non-deliverable will be re-mailed to any address indicated by the postal service in the case of an expired automatic forwarding order. Notices returned as non-deliverable, but for which a new address is not indicated by the postal service, will be further searched through Lexis-Nexis<sup>4</sup> to obtain a more current address. If any such address is found, the Postcard will be re-mailed.

**Paid Media**

24. To effectively reach Class Members, KM recommends a paid media program.

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<sup>1</sup> The NCOA database contains records of all permanent changes of address submissions received by the USPS for the last four years.

<sup>2</sup> CASS is a certification system used by the USPS to ensure the quality of ZIP + 4 coding systems. Records that are properly coded are then sent through Delivery Point Validation to verify that the address is correct. If they are incorrect, DPV will report what exactly is wrong with the address.

<sup>4</sup> Lexis-Nexis uses a variety of third-party sources, including credit reporting and utility company data, to compare latest addresses for U.S. adults and returns updated addresses for them.

25. To design the paid media segment of the notice program, KM analyzed syndicated data available from the 2013 Fall Study from GfK MRI.

26. *Parade* and *USA Weekend* are publications known as newspaper supplements that are inserted into weekend or Sunday editions of newspapers. These magazines, printed on newsprint, contain articles written for broad, general appeal and encourage readership through brevity. Issues are typically fewer than 30 pages. For this Notice Program, KM recommends newspaper supplements because of their cost-effective reach capability.

27. The Publication Notice will appear in the following newspaper supplements:

- a. A 2/5-page ad (5.25" x 6.375") in *Parade* with an estimated circulation of 32,000,000.
- b. A Digest-page ad (5" x 6.4375") in *USA Weekend* with an estimated circulation of 22,250,000.

28. The Publication Notice will appear in the following consumer magazines:

- a. A half-page ad (3.375" x 10") in *People* with an estimated circulation of 3,475,000.
- b. A half-page ad (3.375" x 10") in *Time* with an estimated circulation of 3,250,000.

29. All print advertising will carry a toll-free number and website address for potential Class Members to request or access the Long Form Notice.

30. KM recommends incorporating Internet advertising into the Notice Program in order to provide potential Class Members with additional opportunities beyond the print program. Internet advertising delivers an immediate message and allows the viewer of an advertisement to instantly click through to a website for further information.

31. Banner advertisements measuring 728 x 90 pixels, 300 x 250 pixels, and 160 x 600 pixels will appear, on a rotating basis, on the following Internet Networks:

- a. Xaxis
- b. Microsoft Media
- c. Advertising.com

32. A banner advertisement measuring 110 x 80 pixels will appear, on a rotating basis, on Facebook.com.

33. Banner advertising will also appear in five countries on the Google Display Network—Google Display Network is the world's biggest ad network, reaching nearly 80% of the world's Internet users. Ads will appear in Canada, the UK, Australia, Germany, and Brazil.<sup>5</sup>

#### **Earned Media**

34. An Earned Media Program will also be implemented to amplify the Paid Media Program and provide additional notice to Class Members. The Earned Media Program will focus on a press release that will highlight the toll-free telephone number and Settlement website address so that Class Members can obtain complete information. The Earned Media Program includes:

- a. A press release distributed on PR Newswire's Premier Global Service, reaching approximately 18,783 media outlets worldwide, as well as an additional 5,600 websites. The press release will be disseminated in a number of countries beyond those in which there is paid media because it is an effective method of potentially notifying Class Members in countries

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<sup>5</sup> Our analysis of the data produced by defendants indicates that, for those purchases that have address information, these five countries were the five largest non-U.S. locations of purchasers, representing approximately 60 percent of the non-U.S. ticket purchases.

in which paid media is not an efficient or practicable vehicle. The press release will be distributed on the following PR Newswire Newslines:

- i. US1 National Wire
- ii. Canada Bilingual General Media
- iii. Full Latin America
- iv. Pan Europe
- v. Pan Asia
- vi. Middle East
- vii. Israel
- viii. Essential Africa

b. For distribution on the Premier Global wire, PR Newswire will translate the press release into the following languages:

- i. Arabic
- ii. Chinese (Simplified and Traditional)
- iii. Czech
- iv. French
- v. German
- vi. Hebrew
- vii. Hindi
- viii. Indonesian
- ix. Japanese
- x. Korean
- xi. Malay

- xii. Polish
- xiii. Portuguese
- xiv. Russian
- xv. Slovakian
- xvi. Spanish
- xvii. Thai
- xviii. Urdu

**Online Media**

35. An informational, interactive website is a critical component of the Notice Program. A website is a constant information source instantly accessible to millions. The site will utilize the Internet's ability to serve as a key distribution channel and customer service bureau.

**Other**

36. A toll-free phone number will be established allowing Class Members to call and request that a Notice be mailed to them or listen to frequently asked questions.

37. A post office box will be established allowing Class Members to contact Class Counsel by mail with any specific requests or questions.

38. Class Members who request a Claim Form will have the opportunity to fill out a Claim Form, online or in hard copy, substantially in the form of **Exhibit 2**.

**Effectiveness of Notice Program**

39. For the purpose of evaluating the strength and efficiency of the media, the consumer magazines, newspaper supplements, and Internet banner advertising were

measured against the target audience to establish the estimated reach<sup>6</sup> of the media program and the estimated frequency<sup>7</sup> of exposure to the media vehicles.

40. The Notice Program outlined in this plan provides potential Class Members with multiple exposure opportunities to media vehicles carrying the Notice and delivers the following estimated reach and frequency measurements to the target audience:

- a. In combination with the Direct Notice, an estimated 80% of U.S. adults 25 years of age or older with a household income of \$60,000 or greater will be reached with an average estimated frequency of 2.5 times.

### **THE FORM AND CONTENT OF THE NOTICES**

41. Attached as **Exhibits 3, 4, 5, and 6** are copies of the Publication Notice, Email Notice, Postcard Notice, and Long Form Notice.

42. The Notices effectively communicate information about the Settlement.

43. The Publication Notice, Email Notice, and Postcard Notice are designed to capture the Class Member's attention with clear, concise, plain language. They direct readers to the case website for more information. The plain language text provides important information regarding the subject of the litigation, the Class definition, and the legal rights available to Class Members. No important or required information is missing or omitted. In fact, the Notices state all required information, without omitting significant facts that Class Members need to understand their rights. The Notices also refer readers to the Long Form Notice which is available to those who call or visit the website.

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<sup>6</sup> Reach is the estimated percentage of a target audience reached through a specific media vehicle or combination of media vehicles.

<sup>7</sup> Frequency is the estimated average number of opportunities an audience member has to see the notice.

44. The Long Form Notice will be available at the website or by calling the toll-free number. The Long Form Notice provides substantial information, including all specific instructions Class Members need to follow to properly exercise their rights, and background on the issues in the case. It is designed to encourage readership and understanding, in a well-organized and reader-friendly format. The Long Form Notice will be available in English, German, and Portuguese, covering the U.S. as well as the top five non-U.S. countries of identified ticket purchasers.

45. In preparing the Notices in this Settlement, I have employed communications methods that are well-established in my field. I have embraced the high standards embodied in the Advisory Committee's notes accompanying the 2003 changes to Rule 23(c)(2):

*The direction that the class-certification notice be couched in plain easily understood language is added as a reminder of the need to work unremittingly at the difficult task of communicating with class members.*

## CONCLUSION

46. It is my opinion that the reach of the target audience and the number of exposure opportunities to the notice information are adequate and reasonable under the circumstances. The overall Notice Program adheres to the standards employed by KM for such programs to effectively reach members of settlement groups or classes. The Notice Program as designed fully complies with due process and Rule 23 of the Federal Rules of Civil Procedure.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Washington, D.C. this 16th day of May 2014.



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Shannon R. Wheatman